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State of New York Public Employment Relations Board Decisions from May 26, 2004

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100, AFL-CIO,

Petitioner,

- and -

CASE NO. CP-851

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Employer,

- and -

TRANSPORT WORKERS UNION LOCAL 106 (TRANSIT SUPERVISORS ORGANIZATION CAREER & SALARY UNIT) and DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenors.

KENNEDY, SCHWARTZ & CURE, LLP (STUART LICHTEN of counsel), for Petitioner

MARTIN SCHNABEL, GENERAL COUNSEL (ROBERT K. DRINAN of counsel), for Employer

COLLERAN, O'HARA & MILLS (EDWARD J. GROARKE of counsel), for Intervenor Local 106

JOEL GILLER, GENERAL COUNSEL (MARY J. O'CONNELL of counsel), for Intervenor DC 37

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the petitioner, the Transport Workers Union of America, Local 100, AFL-CIO (TWU) and the intervenors, the Transport Workers Union Local 106 (Transit Supervisors Organization Career & Salary

Unit) (Local 106) and District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (DC37).

TWU filed a unit placement petition, seeking the placement of approximately 400 professional and salaried computer and telecommunications employees[1] of the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) in its unit of hourly employees in operational or maintenance titles. Thereafter, Local 106 intervened to represent only supervisory employees among the petitioned-for titles and to have those titles placed in the units it represents of either operating supervisors or career and salary supervisors employed by MABSTOA. DC37 intervened on the basis of its representation of certain MABSTOA employees and its representation of certain employees of the New York City Transit Authority (NYCTA), in the same titles as those covered by the instant petition. DC37 seeks the accretion of the in-issue titles to its MABSTOA bargaining unit.

The ALJ dismissed the petition, finding that neither TWU's unit, nor the intervenors' units were the most appropriate units for placement of the in-issue titles.

EXCEPTIONS

TWU excepts to the ALJ's determination that the in-issue titles and the titles in the unit represented by TWU do not share a community of interest sufficient to support placement of the titles in TWU's bargaining unit. Local 106 excepts to the ALJ's decision that certain of the petitioned-for titles are not supervisory employees and, therefore, do not share a community of interest with the titles in the supervisory units represented by

[1]The titles covered by the petition are: computer aide, computer programmer analyst trainee, computer programmer analyst, computer associate (technical support), computer associate (operations), computer associate (software), computer typesetter, computer specialist (operations), computer specialist (software), telecommunications associate and telecommunications specialist.

Local 106. DC37 excepts to the ALJ's decision that the unit represented by DC37 was not the most appropriate unit in which to place the petitioned-for employees. DC37 particularly objected to the ALJ's determination that the MABSTOA employees represented by DC37 shared no community of interest with the petitioned-for employees or the other titles represented by DC37 who are employed by the NYCTA, and that its representation of the NYCTA employees could not be considered in determining the most appropriate unit. Both Local 106 and DC37 also except to the ALJ's finding that the titles to be accreted to either unit were greater than 30 percent of the existing units and that, therefore, placement of the titles in either Local 106's or DC37's unit was inappropriate as a matter of law.[2] MABSTOA supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are set forth in detail in the ALJ's decision and we adopt the factual findings therein.[3] Such facts as are necessary for consideration of the exceptions are repeated here.

TWU represents over 5,000 MABSTOA hourly employees in operational and maintenance titles. Local 106 represents approximately 500 MABSTOA supervisory employees in two separate units, one comprised of operating supervisors and the other which includes career and salary employees, primarily administrative assistants, who exercise some supervisory responsibilities. DC37 represents 105 MABSTOA employees in the titles of associate cashier (vault handler), transit customer service

[2] *See Ogdensburg City Sch. Dist.*, 31 PERB ¶3060 (1998).

[3] 37 PERB ¶4003 (2004).

specialist I and II, assistant civil engineer representative and laboratory technician. Also represented by DC37 are computer programmers, computer aides and computer associates employed by NYCTA.[4]

The titles in issue require advanced computer skills and knowledge, are salaried, annual positions with different terms and conditions of employment than those enjoyed by the employees represented by TWU. They do not have any significant supervisory duties similar to the employees represented by Local 106. Likewise, while some employees of MABSTOA represented by DC37 have technical skills, they are not telecommunications or computer specialists and do not share similar job duties and responsibilities. A DC37 local does represent employees who have identical titles and similar job duties and working conditions as the petitioned-for titles. However, those employees are employed by NYCTA, not MABSTOA.

DISCUSSION

As noted by the ALJ, we have held that a unit placement petition is a mini-representation proceeding.[5] In a representation proceeding, the statutory uniting criteria come into play and the ALJ must find initially that there exists a community of interest between the petitioned-for titles and the titles in the bargaining unit into which placement is sought. We find, as did the ALJ, that the MABSTOA employees in the units represented by TWU, Local 106 and DC37 do not share a community of interest

[4] The collective bargaining agreement between attached to DC37's motion to intervene, shows that different locals of DC37 have been recognized to represent employees of NYCTA and MABSTOA in separate units. It appears that these separate locals and separate units are covered by one master contract, with some provisions of the agreement applicable only to employees of NYCTA or only to employees of MABSTOA.

[5] *State of New York*, 36 PERB ¶3007 (2003).

with the MABSTOA telecommunications and computer specialist titles in issue such as would warrant placement of those titles in any existing unit.

As we held in *New York City Transit Authority*,[6] differences in the terms and conditions of employment, training, skills and job responsibilities between the petitioned-for titles and the titles represented by TWU compel a determination that the petitioned-for titles are not appropriately placed in TWU's unit. Likewise, the differences in the skills and training and the lack of supervisory responsibilities of the telecommunication and computer specialists covered by the petition support the ALJ's determination that these titles are not appropriately placed in Local 106's bargaining units.

Finally, as to DC37, the ALJ correctly determined that the MABSTOA employees represented by DC37, while possessing some technical skills, do not share a community of interest with the petitioned-for MABSTOA employees in telecommunication and computer specialist titles. That a local of DC37 represents employees of NYCTA in similar titles does not support the placement of MABSTOA telecommunications and computer specialists in the unit of MABSTOA employees represented by DC37. In an early case,[7] we determined that §1203-a.3(b) of the Public Authorities Law[8] precludes us from treating MABSTOA and NYCTA as a single employer and accreting employees of one employer into a unit of employees of the other employer. MABSTOA, NYCTA and DC37 may have negotiated agreements covering employees of both employers represented by different locals of DC37, but that

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[6] 36 PERB ¶3038 (2003).

[7] *MABSTOA*, 10 PERB ¶3094 (1977).

[8] "Said officers and employees [of MABSTOA] shall not become, for any purpose, employees of the city or of [NYCTA]...."

does not compel us or authorize us to ignore the express language of the Public Authorities Law and cases decided thereunder.[9]

Based upon the foregoing, we deny the exceptions filed by TWU, Local 106 and DC37 and affirm the decision of the ALJ.[10]

As there is no appropriate unit placement for the MABSTOA telecommunications and computer specialist titles in the existing units represented by TWU, Local 106 or DC37, the petition is dismissed in its entirety. SO ORDERED.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[9] *See Reis v. MABSTOA*, 161 AD2d 288 (1st Dep't), *motion for leave to appeal denied*, 76 NY2d 707 (1990).

[10] Given our decision on the merits of the petition, we have not reached the ALJ's alternate basis for dismissal based upon our decision in *Ogdensburg, supra,* note 2.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

- and -

CASE NO. CP-897

BATH MUNICIPAL UTILITY COMMISSION,

Employer.

NANCY E. HOFFMAN, GENERAL COUNSEL (ELLEN M. MITCHELL of counsel), for Petitioner

HARRIS BEACH LLP (EDWARD A. TREVVETT of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions by the Bath Municipal Utility Commission (Commission) to a decision of an Administrative Law Judge (ALJ) granting the unit placement petition of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), seeking to place the titles of office manager, line supervisor, utility service supervisor, utility maintenance supervisor, chief wastewater treatment plant operator, and accounting supervisor into its existing bargaining unit.

The Commission opposed the petition and, in its response, alleged certain defenses, one of which alleged that the parties' collective bargaining agreement (CBA) specifically excluded supervisors.

EXCEPTIONS

The Commission filed exceptions to the ALJ decision alleging, *inter alia*, that the ALJ erred on the facts and the law and the ALJ failed to give adequate weight to the employer's uniting preference. CSEA submitted a response to the exceptions in support of the ALJ's decision.

Based upon our review of the record and the parties' arguments, we reverse the decision of the ALJ and dismiss the petition.

FACTS

The CBA between the Commission and CSEA covering the period June 1, 2001 to May 30, 2004,[1] provides as follows:

Section III, entitled "Recognition", states that:

> The Commission recognizes the CSEA [sic] . . . as the sole and exclusive representative for all employees in the unit exclusive of part-time and/or temporary employees (i.e. hired for the months of May, June, July and August) and the supervisory staff, for the purposes of collective bargaining with respect to rates of pay, work conditions and other terms and conditions of employment.

Section IV, entitled "Collective Bargaining Unit", declares that:

> The CSEA unit represents all permanent employees holding a position by the appointment or employment in the service of the Commission, and as defined by Section 201 subdivision 8, Public Employees' Fair Employment Act, except the nine (9) supervisory staff positions.

Section V, entitled "Definitions", defines at subdivision A6:

> Supervisory Staff: The Director of Municipal Utilities, the Assistant Director of Municipal Utilities, the Utilities Office Manager, the Utilities Operations Supervisor, the Departmental Supervisors, and the Secretary or Typist acting as secretary to the Director constitute the supervisory staff . . . It is the function and duty of these staff

[1] Petitioner's Exhibit #7.

employees to implement and administer the policy decision of the Commission and the Village of Bath.

The petition sought to include the titles of office manager, line supervisor, utility service supervisor, utility maintenance supervisor, chief wastewater treatment plant operator and accounting supervisor.

The organization chart[2] illustrates the various department heads as follows: the Director (Matthew Benesh), Office Manager (Shirley Edwards), Accounting Supervisor (Paul Webster), Overhead Line Supervisor (Daniel Nolbes), Utility Service Supervisor (Dale Hare), Underground Line Maintenance Supervisor (Guy McGlynn), and Wastewater Treatment Plant Chief Operator (Royce Hoad). Under each department head, the chart identifies the respective subordinate employees.

Benesh testified on behalf of the Commission. His testimony, on cross-examination, was limited to an admission that the Commission formulates the policies and mission of the Commission. His direct testimony described the functions performed by the several supervisors. He stated that, although he directs the policies of the Commission, he does not manage the departments on a day-to-day basis. He leaves management of the departments to the supervisors. Benesh instituted supervisors' meetings after he became Director. These meetings were intended to be interactive so that the supervisors could exchange ideas among themselves and with him.

He described the various projects each of the supervisors was involved with. Some of the projects were the result of the supervisors' recommendations that the Commission accepted while others may have resulted from a consultant's recommendation. Benesh gave as examples the computer project that Webster

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[2] Employer Exhibit #2.

recommended; the installation of substations recommended by Nobles' predecessor, which was completed with Nobles' involvement; the fact that Hare would be in a position to recommend the replacement of vintage gas equipment; the fact that McGlynn recommends which wells should receive maintenance; and that Hoad was involved in a major project involving the wastewater treatment plant in 1994. Also, Hoad decides to accept or reject sludge from outside sources in consultation with either Benesh or the Commission.

Benesh developed the budget with the assistance of the supervisors and presented it to the Commission. The accounting supervisor, Webster, assisted this effort with aid of computer software.

With regard to discipline, Benesh testified that, although there have been no discipline problems, the supervisors follow the CBA. The CBA, at section XXV, entitled "Disputes", describes the procedure to follow in order to resolve disputes. The employee is to first consult with his CSEA unit representative who will then "assist the employee and his department supervisor in reaching an amicable solution under the terms and conditions of this agreement."

The department supervisor is the first step in the grievance process. Under section XXVI, entitled "Grievances", an aggrieved employee presents his grievance to his department supervisor informally. At this stage of the process, the department supervisor has the discretion to resolve the grievance without the intervention of the Director of Municipal Utilities. The department supervisor merely has to notify the Director of the resolution.

Benesh described the procedure for an employee to receive an increment. Section XII, subdivision A(1) and (2) of the CBA, entitled "Increments", gives the

department supervisor the discretion to award an increment to an employee based upon adaptability and proficiency.

Section X, entitled "Absence Without Leave", mandates that the department supervisor shall investigate and report the circumstances regarding absences to the Director of Municipal Facilities. In addition, the department supervisor may take such disciplinary action as he deems necessary. Section XI, entitled "Other Employment", permits the department supervisor to determine whether an employee's outside employment is interfering with the performance of his or her duties for the Commission.

Section IX, entitled "Sick Leave, Sick Leave Bank, Leave of Absence, Funeral Leave and Rest Periods", describes the negotiated procedure to be followed by employees. With regard to sick leave, each employee shall report absence because of sickness to the department supervisor. Paragraph 5 compels an employee taken sick or injured on vacation to submit a doctor's certificate to the department supervisor or Director of Municipal Utilities. Subdivsion E, entitled "Rest Periods", provides that coffee may be supplied to employees during a rest period at the job site at the discretion of the department supervisor.

Benesh stated that he had no part in the decision to schedule employees for overtime work. The supervisors made that determination. With regard to performance evaluations, Benesh testified that supervisors have not evaluated their respective employees in the bargaining unit. He also acknowledged that he has not done an evaluation of the supervisors.

The supervisors testified on behalf of CSEA. Nobles' testimony described his obligations under the CBA. He stated that he could not fire someone on his own. He limited his role to the terms of the CBA. He said that he took no part in Commission

meetings nor did he have input into Commission policy. On cross-examination, Nobles stated that he was involved in hiring Mark Hawk. He interviewed Hawk and recommended to Benesh that the Commission hire Hawk. He also interviewed Jeffrey Smalt and he was subsequently hired. He described his role in the budget process. Nobles stated that he submitted his priorities to Benesh. Nobles stated that he has yet to be involved in a grievance as a manager.

McGlynn testified generally about his duties. He noted that most overtime came on an emergency basis. He stated that he never participated in contract negotiations. On cross-examination, he stated that he decides when the third shift is scheduled to flush hydrants. He described his role in interviewing new hires within his department. He decides when to replace equipment.

Hare testified about his job duties. He supervises eight people, some of whom "work on a 24-hour desk". He described how sick leave, vacation and overtime is processed. In response to the question, "[C]an you deviate from the terms of the collective bargaining agreement when granting accrual time?" his response was "No". He acknowledged that he cannot hire or fire anyone by himself. He played no role in contract negotiations. On cross-examination, Hare described his involvement in hiring Steven Larsen and Donald Bates. Hare recommended and the Commission subsequently hired those two men. He described his role in the Buck Meadows project. This was a housing development and Hare recommended the amount of gas per pound that would run through the project. Hare used his judgment to make this recommendation which was subsequently followed.

Webster testified that he does not supervise anyone directly. His job duties generally consist of recordkeeping and keeping the books for the Electric Department.

He also does most of the information technology work. He does not purchase the computer hardware. He completes an order or requisition and gives it to Benesh's secretary. He troubleshoots the computer hardware whenever the need occurs. He stated that he has never read the files stored on employees' computers. He develops a monthly income expense statement as well as other financial data. These reports are available to the public. When asked if he was ever requested to produce a report with regard to CSEA salaries, he had no answer. The ALJ rephrased the question to assume a wage report generated for a three-year period that included percentage increases. Webster responded to the ALJ that he had not been asked to produce such a report. On cross-examination, Webster acknowledged that he produced Employer's Exhibit #7, a salary schedule that contains a comparison of salaries for the supervisors with steps and no longevity or longevity only.

DISCUSSION

We recently addressed the issue raised by the Commission in its exceptions. In *Regional Transit Service*,[3] a unit placement petition was filed seeking the placement in the petitioner's bargaining unit of a title that had been specifically excluded from the bargaining unit by the language in the recognition clause of the parties' collective bargaining agreement. We reiterated our long-standing policy, first articulated in *State of New York*,[4] and restated in *County of Rockland*,[5] that

> [a]lthough public employers and employee organizations are encouraged to agree upon the composition of bargaining units, as well as the terms and conditions of employment of unit employees, when a representation dispute arises, PERB

[3] 35 PERB ¶3022 (2002).

[4] 1 PERB ¶399.85 (1968) (subsequent history omitted).

[5] 28 PERB ¶3063 (1995).

> has the statutory duty, pursuant to §207 of the Act, to determine the most appropriate bargaining unit consistent with the criteria contained therein. Agreements between the employer and the employee organization regarding unit inclusions and exclusions are, accordingly, not controlling.[6]

A unit placement petition is, in substance and effect, a mini-representation proceeding calling only for a non-adversarial investigation and the application of the statutory uniting criteria in §207.1 of the Act. We, therefore, consider this case in the context of our decisions determining whether a community of interest, or the potential for a conflict of interest, exists between the petitioned-for employees and the employees in the bargaining unit. The language of the parties' contractual recognition clause is not, therefore, dispositive in this analysis.

We now turn to the facts of the case as presented by the parties and find that the in-issue titles have sufficient supervisory responsibilities such as to their placement in CSEA's unit inappropriate.

CSEA contends that we should place supervisors in its unit because there is no prohibition against mixed units of supervisors and rank-and-file employees. While as a general proposition, that is correct, it is not the end of the analysis. In support of its argument, CSEA relies on our decision in *County of Genesee* (hereinafter, *Genesee*).[7] In *Genesee*, we stressed that it was not the supervisory status of the employee that was controlling, but the nature and level of the supervisory functions performed that would determine whether inclusion of supervisory titles in a unit of rank-and-file employees was appropriate. In *Genesee*, the head nurses and supervising nurses were not

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[6] *Id.* at 3143.

[7] 29 PERB ¶3068 (1996).

fragmented from an existing unit of nurses because of the nature and level of supervision. It was determined that the head nurses and supervising nurse did not perform significant supervisory duties and responsibilities.

CSEA also contends that the supervisors share a community of interest with other titles in the bargaining unit because they receive the same benefits as unit members. This argument is not persuasive. Where there is a potential for conflict because of supervisory responsibilities, the fact that the supervisors share similar benefits with the rank-and-file employees does not compel the inclusion of supervisors in a unit of rank-and-file employees.

On this record, the organizational chart depicts a vertical line of authority. Benesch's undisputed testimony established that he is not involved in the day-to-day operations of the various departments. The supervisors are the next level of authority on the chart and they function as the department heads. The contract language illustrates that they are directly responsible for the decisions that affect the rank-and-file employees' terms and conditions of employment. Under the terms of the CBA, they have the discretion to resolve grievances, award an increment based upon adaptability and proficiency, determine whether an employee's outside employment might be interfering with the performance of his duties for the Commission, receive reports from employees concerning their illness and doctors' certificates, schedule overtime and interview prospective employees. Nobles considers himself to be a manager. While the record does not support the Commission's contention that the supervisors are managerial, it is equally clear from these facts that these supervisors are high-level supervisors in this organization and not "mid-level" as found by the ALJ.

When analyzing whether a community of interest exists, we must also look at whether there are any conflicts of interest inherent in a proposed unit which would make such a unit unacceptable or undesirable.[8] We find it significant that the supervisors covered by the petition are responsible for the day-to-day operation of each department. It is not unreasonable, under the circumstances, to anticipate that whatever tension may be generated by such supervision would complicate relationships between supervisors and rank-and-file employees. While not dispositive of the issues raised here, the question also arises whether the supervisors would be adequately represented in a unit that is overwhelmingly dominated by rank-and-file employees.

We have held that any questions under the community of interest criterion as to the appropriateness of the unit placement are removed upon application of the "administrative convenience" uniting criterion in §207.1(c) of the Act. That criterion requires weight be given to an employer's uniting preference.[9] Here, the Commission has contended that placing the supervisors into the CSEA unit would be inappropriate because of their duties and responsibilities and, therefore, the most appropriate unit would be a unit of supervisors. Given the level and degree of supervision exercised by the petitioned-for titles and the Commission's stated uniting preference, we find that a combined unit of these employees and the rank-and-file employees they supervise is not the most appropriate unit.

Based on the foregoing, we grant the Commission's exceptions and reverse the decision of the ALJ.

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[8] *State of New York (Div. of Military and Naval Affairs)*, 19 PERB ¶3008 (1986).

[9] *Town of Huntington*, 33 PERB ¶3049 (2000); *Malone Cent. Sch. Dist.*, 31 PERB ¶3050 (1998).

IT IS, THEREFORE, ORDERED that the petition be, and hereby is, dismissed in its entirety.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOO H. (SUSAN) TSUI,

Charging Party,

- and -

CASE NOS. U-22908 & U-22988

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

SOO H. (SUSAN) TSUI, *pro se*

ROBERT E. WATERS, SUPERVISING ATTORNEY (ORINTHIA E. PERKINS of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Soo H. (Susan) Tsui to a decision of an Administrative Law Judge (ALJ) dismissing two improper practice charges. The first charge (U-22908) alleges that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when, in retaliation for engaging in protected activity, it placed a disciplinary letter, dated June 18, 2001, and an unsatisfactory observation report, dated June 19, 2001, in her personnel file. Tsui's second charge (U-22988), dated November 30, 2001, alleges that the District violated §§209-a.1(a) and (c) of the Act when it terminated her employment.

The District submitted an answer to each charge that denied the material allegations and raised the defenses of timeliness and notice of claim.[1]

EXCEPTIONS

Tsui has excepted to the ALJ's decision on several grounds. We will address the principal exceptions that allege the ALJ erred in her analysis of the facts and law.

Based on our review of the record and our consideration of Tsui's arguments, we affirm the ALJ's decision.

FACTS

We adopt the ALJ's findings of fact[2] and will reference only the facts as relevant to Tsui's exceptions.

Tsui, a licensed social worker, was hired by the District to replace a retiring guidance counselor at Intermediate School (IS) 131, School District 2, in September 2000. She began her work at IS 131 on September 5, 2000, and, in October 2000, she was informed by the principal, Alice Young, that her employment had been terminated. This caused Tsui to contact United Federation of Teachers (UFT) representative Richard Tokar, who interceded on her behalf with Young. Young agreed to provide Tsui with a letter of termination. At the time of her employment termination, Tsui was a probationary employee.

Later in October 2000, Tsui contacted UFT representative for District 2 Stewart Cohen, and Ira Kurland, UFT representative for social workers and psychologists. They

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[1] The ALJ dismissed the District's notice of claim defense. As there were no exceptions taken to this ruling, we not address this issue.

[2] 36 PERB ¶4582 (2003).

prevailed upon the superintendent's representative, George Miller, to restore her employment and Tsui was able to return to IS 131 at the end of December 2000.

In January 2001, Tsui was advised by Beverly Hershkowitz, guidance supervisor for District 2, that she would be observing Tsui conducting a counseling session on January 22, 2001. Hershkowitz gave Tsui an unsatisfactory evaluation. Hershkowitz testified that Tsui's counseling skills were inadequate. Hershkowitz scheduled Tsui for an intervisitation with a senior counselor. Tsui maintained in her testimony that she had been unfairly evaluated.

On March 26, 2001, Hershkowitz conducted a second observation. Again, she gave Tsui an unsatisfactory evaluation. Hershkowitz noted that Tsui's counseling skills remained inadequate. Tsui disagreed with the evaluation and filed a grievance. Her grievance was denied at the step two hearing held on June 12, 2001, before Miller. Cohen and Kurland both testified that, prior to the step two hearing, Miller offered to withdraw the unsatisfactory evaluations in return for Tsui's resignation and agreement not to seek future employment in District 2.

A third observation of Tsui was scheduled for June 18, 2001. This observation was conducted by Marjorie Robbins, Director of Pupil Personnel Services for District 2, and the administrator in charge of the guidance department. Robbins conducted the observation jointly with Hershkowitz. They were to meet with Tsui on June 14, 2001, to discuss their expectations. On June 14, 2001, Robbins and Hershkowitz observed Tsui arriving inappropriately late for her position. Hershkowitz sent Tsui a letter dated June 18, 2001, reprimanding her for lateness. The letter was placed in Tsui's personnel file and Tsui filed a grievance.

The observation on June 18, 2001, started late because the students were involved with tests administered prior to the session. On June 19, 2001, Robbins gave Tsui an unsatisfactory evaluation because she was unable to keep the session focused on the stated goals. Tsui filed a grievance challenging the evaluation.

The "Annual Professional Performance Review and Report on Probationary Service of Guidance Counselor", issued on June 20, 2001, indicated that Tsui received an unsatisfactory evaluation in five performance areas and an overall performance evaluation of unsatisfactory. The report was signed by Hershkowitz and Young. The superintendent recommended discontinuance of Tsui's probationary service, effective August 1, 2001.

Step 2 hearings were held before Miller on two of Tsui's grievances. Miller sustained Tsui's grievance on the letter of reprimand but denied her grievance on the second unsatisfactory evaluation.

DISCUSSION

Tsui contends that the ALJ did not consider several of her exhibits in drafting the ALJ's decision. Also, Tsui contends that the ALJ overlooked relevant testimony.

The ALJ, in case U-22988, granted the District's timeliness defense, that affected events occurring prior to July 30, 2001. Since the charge was filed on November 30, 2001, all events occurring prior to July 30, 2001, would be untimely. As the ALJ noted, the only timely event in that case was Tsui's employment termination effective August 1, 2001.

In case U-22908, the charge was filed on October 19, 2001. The charge focused on the letter of reprimand dated June 18, 2001, and the June 19, 2001 unsatisfactory evaluation.

The elements necessary to establish a violation of §§209-a.1(a) and (c) of the Act:

> [A] charging party must prove [by a preponderance of the evidence] that he had been engaged in protected activities, and that the respondent had knowledge of and acted because of those activities. If the charging party proves a *prima facie* case of improper motivation, the burden of going forward shifts to the respondent to establish that its actions were motivated by legitimate business reasons.[3]

Tsui, in her exceptions, urges us to reverse the ALJ's decision. The evidence Tsui asks us to consider is irrelevant.[4] The record is clear that she was engaged in a protected activity in October 2000 when she sought the aid of her union to intercede and return her to her position. She also engaged in protected activity when she filed grievances objecting to the unsatisfactory evaluations and the letter of reprimand. The District was well aware of this activity because of its necessary participation in restoring Tsui to her position as well as its participation in the grievance process.

We agree with the ALJ that the only issue for Tsui to establish was whether the complained of action would not have occurred but for her participation in protected activity. On this record, we concur with the ALJ's conclusion that there was insufficient evidence that the District was improperly motivated in taking action regarding Tsui.

Tsui introduced no evidence to establish that the unsatisfactory evaluations she received were improperly motivated or were done in retaliation for those protected activities. On the contrary, and despite Tsui's unsatisfactory evaluation, the District restored her to her position with periodic evaluations of her performance, thus allowing

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[3] *State of New York (SUNY Oswego)*, 34 PERB ¶3017 (2001).

[4] The evidence Tsui submitted consisted of information that she considered important to her performance evaluation.

Tsui to correct her weaknesses. She failed to improve in the estimation of the District. Thus, Tsui failed to demonstrate any nexus between her protected activity and her subsequent unsatisfactory evaluations.[5]

Notwithstanding Tsui's unsatisfactory evaluations, her employment as a probationary employee was terminable at will and without specific reason and, absent bad faith, the determination must be upheld.[6] "Bad faith" in the probationary context is only that action based on a constitutionally impermissible purpose or in violation of statutory or decisional law.[7] As before PERB, "bad faith" is that action which violates the Act or, stated otherwise, is that taken in retaliation for protected activity.[8] Hence, a charging party challenging the termination of a probationary employee must show that the employer's motivation was improper and unlawful.[9]

Moreover, our area of expertise is limited to interpretation of the Act,[10] therefore, we do not pass judgment on the content of evaluations made of Tsui's counseling ability except to the extent that our review is necessary to a determination whether they were

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[5] *Board of Educ. of the City Sch. Dist. of the City of New York*, 35 PERB ¶3002 (2002); *Board of Educ. of the City Sch. Dist. of the City of New York*, 34 PERB ¶3036 (2001).

[6] *Talamo v. Murphy*, 38 NY2d 637 (1976); *Ostoyich v. State of New York*, 99 AD2d 839 (2nd Dep't), *motion for leave to appeal denied*, 62 NY2d 605 (1984); *Blum v. Quinones*, 139 AD2d 509 (2nd Dep't), *appeal dismissed*, 72 NY2d 908 (1988).

[7] *Soto v. Koehler*, 171 AD2d 567 (1st Dep't) *motion for leave to appeal denied*, 78 NY2d 855 (1991).

[8] *Board of Educ. of the City Sch. Dist. of the City of New York*, 26 PERB ¶4555, *aff'd*, 26 PERB ¶3082 (1993).

[9] *County of Wyoming*, 34 PERB ¶3042 (2001).

[10] *County of Nassau (Nassau Community Coll.) v. PERB*, 151 AD2d 168, 22 PERB ¶7034 (2nd Dep't 1989), *aff'd on other grounds*, 76 NY2d 579, 23 PERB ¶7019 (1990).

improperly motivated or that they are evidence of a legitimate business purpose for the action taken. Having found no evidence of improper motivation, we affirm the decision of the ALJ and dismiss the exceptions.

SO ORDERED.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUPERIOR OFFICERS ASSOCIATION OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, INC.

Charging Party,

- and -

CASE NO. U-23900

COUNTY OF NASSAU,

Respondent.

CERTILMAN BALIN ADLER & HYMAN, LLP (WAYNE J. SCHAEFER, of counsel), for Charging Party

LORNA B. GOODMAN, COUNTY ATTORNEY (DENNIS J. SAFFRON, of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to an Administrative Law Judge's (ALJ) decision that found that the County of Nassau (County) had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued the practice of assigning a County vehicle to superior officers represented by the Superior Officers Association of the Police Department of the County of Nassau, Inc. (SOA).

EXCEPTIONS

The County excepts to the ALJ's decision on the ground that SOA failed to prove a valid charge. SOA filed a response in support of the ALJ's decision.

Based upon the record before us, we reverse the decision of the ALJ.

FACTS

Within the Police Department of the County of Nassau, SOA represents a unit of superior officers that includes sergeants, lieutenants, captains, deputy inspectors, inspectors, deputy chief, and assistant chief.

The charge, as amended, involves four sergeants who had been assigned to the Department's Applicant Investigation Unit (AIU). The sergeants assigned to AIU supervise the police officers assigned to that unit.

Sergeants John Ruane, Edward Perkins and Margaret S. Funk each testified about the circumstances under which they were assigned a County vehicle upon their assignment to the AIU unit. In addition to their work schedules, they were allowed to use the vehicles to commute between home and work. As a result of their assignment to AIU, they could use the vehicles on a twenty-four hour basis except for personal use. On July 19, 2002, Ruane, Perkins and Funk were temporarily transferred out of AIU to other assignments. During the period of the temporary transfer, Ruane, Perkins and Funk lost the use of a County vehicle on a twenty-four hour basis.

Perkins testified that, upon his reassignment to AIU in September 2002, the use of a County vehicle was restored but was thereafter revoked in November 2002. On cross-examination, Perkins testified that he was not aware of anyone above the rank of commanding officer that authorized the use of a take-home car. Ruane testified that, upon his return to AIU in October 2002, Lt. Allen McGovern, commanding officer of AIU, advised him that he was unable to reassign to him a County vehicle for twenty-four hour use. Any vehicle assigned was only to be used during working hours and could not be driven home. Funk testified that, upon her return to AIU in November 2002, she was not reassigned a County vehicle for twenty-four hour use. Funk stated that the order revoking

the use of the County vehicles on a twenty-four hour basis came from Inspector Lorraine Hannon, commanding officer of the Personnel and Accounting Bureau.

Sergeant Michael Cafarella testified that, as a police officer, he was assigned to AIU in 1989 at which time Chief David Murray, former commanding officer of the Personnel and Accounting Bureau, told him that there would be a vehicle assigned with the command. According to Cafarella, in 1989 all of AIU's sergeants were assigned a County vehicle for twenty-four hour use.

Cafarella was promoted to sergeant in 1992 and, as a supervisor in AIU, he was assigned a County vehicle for twenty-four hour use. In September 2002, McGovern advised Cafarella that the department intended to remove the County vehicles from the AIU sergeants who had been reassigned. Cafarella testified that Hannon told him that no one in the AIU would be assigned a County vehicle except the commanding officer and the deputy commanding officer. Cafarella became the deputy commanding officer on December 6, 2002.

By November 2002, the use of a County vehicle on a twenty-four hour basis had been removed from all AIU sergeants. SOA filed the instant charge, as amended, on December 4, 2002. The County, in its answer, raised the affirmative defense that SOA waived its right to negotiate over the County's decision to implement the at-issue change.[1] The parties' collective bargaining agreement makes no mention of the use of County vehicles.

A hearing was held on May 20, 2003, and, at the conclusion of SOA's direct case, the County moved to dismiss on the ground that SOA failed to prove a *prima facie* case.

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[1] The ALJ dismissed the County's waiver defense for failure to plead or prove any facts upon which a waiver could be found.

The motion was denied and the County was directed to present its case. The County elected not to proceed and moved to dismiss the charge upon the record before the ALJ. By decision, dated December 30, 2003, the ALJ found the County in violation of §209-a.1(d) of the Act.

DISCUSSION

SOA's charge alleges, *inter alia*, that the County's refusal to reassign County vehicles to Perkins, Funk and Ruane unilaterally changed a mandatory term and condition of employment and violated the County's duty to negotiate in good faith. The County's exception argues that SOA failed to prove the essential elements of a past practice based on our decision in *Sherburne-Earlville Central School District,*[2] (hereafter, *Sherburne-Earlville*) and, therefore, the charge should be dismissed.

We concur with the ALJ's conclusion that, in general, an employee's use of his/her employer's vehicle for transportation to and from work is an economic benefit for the employee and may not be unilaterally withdrawn by the employer.[3] However, we disagree with the ALJ's conclusion that SOA has proven that a past practice was established.

In order for us to find a violation on this record, we must find that the alleged past practice was unequivocal and existed for a significant period of time such that the employees in the unit could reasonably expect the practice to continue without change.[4]

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[2] 36 PERB ¶3011 (2003).

[3] *County of Nassau*, 35 PERB ¶3036 (2002); *County of Monroe*, 33 PERB ¶3044 (2000); *County of Nassau*, 26 PERB ¶3040 (1993), *confirmed*, 215 AD2d 381, 28 PERB ¶7011 (2d Dep't 1995).

[4] *County of Nassau*, 35 PERB ¶3036 (2002); *City of Peekskill*, 35 PERB ¶3016 (2002).

That the benefit inured only to sergeants in the AIU does not preclude the finding of a past practice because we have determined that a practice may be title specific and need not affect the unit as a whole if a rational basis is demonstrated for so limiting the practice.[5]

SOA has the burden of proof to establish by a preponderance of the reliable evidence that a past practice had, in fact, existed[6] and that the County's action in revoking the twenty-four hour use of County vehicles by the AIU sergeants is a change in that practice. Consequently, if SOA fails to prove an essential element of the charge, the charge will be dismissed.[7]

Here, the three sergeants testified that, upon their assignments to the AIU unit, each received a County-owned vehicle with twenty-four hour use. The only implicit caveat was to avoid personal use of the vehicle.[8] While this testimony establishes which employees had the use of the County's vehicles and the limitations on their use of the vehicles, it is insufficient to establish the violation alleged. It cannot be concluded on this record that the alleged practice was unequivocal. Inherent in the finding that a practice is unequivocal is the concept of the employer's knowledge of the practice either through direct negotiations or indirectly through condoning, ratifying or acquiescing in the

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[5] *County of Nassau*, *supra*, note 4.

[6] *State of New York*, 33 PERB ¶3024 (2000), *confirmed sub nom. Benson v. Cuevas*, 288 AD2d 542, 34 PERB ¶7034 (3d Dep't 2001).

[7] *Id.*

[8] Transcript, p. 45.

practice.[9] There is no evidence on this record of direct negotiations or that the County authorized, ratified, condoned or acquiesced in the alleged practice.[10]

We reject the ALJ's attempt to either factually or legally distinguish the instant case from *Sherburne-Earlville*. The principle underlying *Sherburne-Earlville*, as with the instant case, was whether the employer's agent had the authority to bind the employer to the alleged practice. We held in *Sherburne-Earlville* that we should not assume an employee's authority merely from his/her status as a supervisor. Instead, we should require a more definite delegation of authority to the employee. In support of this principle, we cited to *City of Schenectady*.[11] The ALJ has misinterpreted our reliance on the *City of Schenectady* in support of her decision that "the totality of the circumstances" will suffice to establish the agent's authority. It is within "the totality of the circumstances" that an inquiry into the employee's authority is made. As we said in *Schenectady*, "[t]he ultimate focus must always be on the agency relationship, not supervisory status itself."[12] This is a fact question which the charging party must prove.[13]

We have, on occasion, found decisions of the National Labor Relations Board (NLRB) and other jurisdictions to be instructive. However, on the issue presented in this

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[9] *Supra,* note 2.

[10] *Sherburne-Earlville Cent. Sch. Dist.*, *supra*; *State of New York (Dep't of Correctional Services)*, 36 PERB ¶3040 (2003); *State of New York (Wende Correctional Facility)*, 33 PERB ¶3022 (2000).

[11] 26 PERB ¶3038 (1993).

[12] *Id.* at 3064.

[13] 2A NY Jur. 2d, Agency and Independent Contractors, §30; *see also* 3 Am. Jur. 2d, Agency, §342; *accord Lancaster County*, 1993 PPER (LRP) Lexis 159 (1993); *Inglewood Unified Sch. Dist.*, 1991 PERC (LRP) Lexis 239.

case, we reject the NLRB decisions regarding acts of supervisors that are imputed to their employer because the National Labor Relations Act (NLRA) statutorily defines a supervisor as the employer's representative.[14] There is no similar provision in our Act. We are, therefore, in accord with the rationale of the California Court of Appeals, in *Inglewood*, which is consistent with our prior holding in *Sherburne-Earlville*.[15]

As in *Sherburne-Earlville*, the record in this case is devoid of any facts regarding knowledge of the alleged practice by SOA's bargaining representative or the County. The testimony of all three sergeants points to the lieutenant in the AIU unit as the person assigning County vehicles to them. There is no testimonial or documentary evidence that establishes his authority to make such an assignment. We may not assume that the lieutenant in the AIU unit had the implied authority to represent the collective bargaining interests of the County. Although Cafarella makes reference to a conversation with Chief Murray in 1989, Cafarella makes only an oblique reference to the practice in question. We are left to speculate what he meant by his comment, "there would be a vehicle assigned with command." Consequently, the County's authorization of, ratification of, acquiescence in or condonation of this alleged practice has not been established. Perkins testified on cross-examination that he was not aware of anyone above a command position that authorized the use of a County vehicle. Inspector Hannon was in a command position, however, the sergeants, lieutenants and inspector involved in this case are all represented by SOA. We cannot determine on this record the command structure of the Nassau County Police Department in order to identify those individuals who might possess express or implied policy-making authority sufficient to bind the

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[14] 5 USCS §7103 (10).

[15] *Inglewood Unified Sch. Dist., supra,* note 13.

County on this issue. Consequently, SOA has failed to prove mutuality in the creation of the practice.[16]

Furthermore, there is no evidence of the employer's indirect knowledge of the alleged practice. We may not speculate on whether the County authorized, condoned, ratified or acquiesced in the alleged practice.[17]

We reject the ALJ's conclusion that the County in this matter was not free to unilaterally remove the assigned vehicles because it would change the *status quo*. The ALJ's decision is based on the principle that the status quo may not be changed unless and until the parties have fulfilled their collective bargaining responsibilities under the Act. This principle is correct, however, it was misapplied in this case.

As we have found in this case, the evidence does not establish that the County ever agreed to the alleged practice. The Act defines an agreement as the result of the exchange of mutual promises between the chief executive officer of a public employer [or

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[16] *Supra,* note 8. *See also Southfield Educ. Ass'n., v. Southfield Pub. Schools*, 2004 MPER (LRP) Lexis 4.

[17] The following represents the Nassau County cases that have come before PERB ostensibly on the issue of past practice and whether the County violated the Act when it unilaterally removed an assigned vehicle. It must be noted that in those cases where a violation was found, it was based upon the conduct of a County policymaker. *See County of Nassau*, 35 PERB ¶4583 (2002) [finding no violation of conditional assignment of County-owned vehicles in Sheriff's Department]; *County of Nassau*, 19 PERB ¶4580 (1986) [finding no violation of conditional assignment of County-owned vehicle in Water Department]. But *cf. County of Nassau*, 35 PERB ¶3036 (2002) [finding a violation because the Sheriff unilaterally issued directive rescinding 24/7 use of County-owned vehicles]; *County of Nassau*, 26 PERB ¶3040 (1993), *aff'd,* 215 AD2d 381 (2d Dep't 1995) 28 PERB ¶7011 (1995) [finding a violation because the Commissioner of DPW issued directive rescinding 24/7 use of County-owned vehicles]; *County of Nassau*, 13 PERB ¶3095 (1980), *aff'g* 13 PERB ¶4570 (1980), *confirmed,* 14 PERB ¶7017 (Sup. Ct. Nassau Co. 1981), *aff'd,* 87 AD2d 1006, 15 PERB ¶7012 (2d Dep't 1982), *motion for leave to appeal denied*, 57 NY2d 601, 15 PERB ¶7015 (1982) [finding a violation in DPW upon stipulated facts].

its designee] and the employee organization which becomes a binding contract.[18]

Furthermore, the Act describes the process of collective negotiations:[19]

> . . . to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . .

Thus, the ALJ's conclusion that the obligation to maintain the status quo as to noncontractual terms and conditions is not based upon "mutual" agreement is the antithesis of the policy underlying the Act. Here there has been no showing that the practice was either mutually created or mutually accepted.

Based upon the foregoing, we hereby grant the County's exceptions and reverse the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the charge herein be, and it hereby is, dismissed.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[18] Act, §201.12.

[19] Act, §204.3.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCHESTER POLICE LOCUST CLUB, INC.,

Charging Party,

- and - **CASE NOS. U-23938 & U-24081**

CITY OF ROCHESTER,

Respondent.

TREVETT, LENWEAVER & SALZER, P.C. (LAWRENCE J. ANDOLINA of counsel), for Charging Party

LINDA S. KINGSLEY, CORPORATION COUNSEL (YVETTE CHANCELLOR GREEN of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the City of Rochester (City) to a decision of an Administrative Law Judge (ALJ) finding that the City violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it denied police officers represented by the Rochester Police Locust Club, Inc. (Locust Club), who were under criminal investigation, access to a Locust Club representative. The charge filed by the Locust Club in U-23938 alleges that the City denied a request by Officer McHale for union representation during a criminal investigation conducted by the City following an incident on September 25, 2002, when Officer McHale discharged his weapon. The charge filed by the Locust Club in Case U-24081 alleges that the City denied a request by Officer Snow on February 14, 2003, for representation by a Locust Club

representative while he was under investigation for discharging his weapon during his response to a robbery in progress at a home. The charges were consolidated for hearing and decision.

The ALJ found that the City violated the Act in both cases when it denied requests by Officers McHale and Snow for union representation and when it denied the Locust Club access to the officers during the criminal investigations conducted by the City into the underlying incidents. The ALJ relied upon the Board's recent decision in *New York City Transit Authority* (*NYCTA*),[1] in which we found that, when union representation has been requested, an employee covered by the Act has a statutory right to refuse to submit without union representation to an investigatory interview which he or she reasonably fears may result in discipline. In *NYCTA*, we found the Act made applicable to public employees the decision of the U.S. Supreme Court in *National Labor Relations Board v. Weingarten* (*Weingarten*),[2] holding that

> ... it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview that may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.[3]

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[1] 35 PERB ¶3029 (2002), *confirmed*, 196 Misc2d 532, 36 PERB ¶7009 (Sup. Ct. Kings County 2003) (*appeal pending*).

[2] 420 US 251 (1975).

[3] *Id.* at 257.

EXCEPTIONS

The City excepts to the ALJ's decision on the grounds that there is no right to union representation at a criminal investigation and that public policy considerations preclude union representation at criminal investigations. The Locust Club supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are few and are not in dispute, the parties having stipulated to a record upon which the ALJ based her decision.[4]

The City defines a situation in which a police officer discharges a weapon as a "critical incident". When such an incident occurs, the City's Police Department (Department) conducts two separate but parallel investigations. One is conducted by the Professional Standards Section (internal affairs) and is used to decide whether departmental charges should be filed and discipline imposed. Article 20 of the parties' collective bargaining agreement covers this procedure and provides for the right of union representation during any investigatory interviews upon the request of the officer. The Department also conducts a criminal investigation of critical incidents. Such investigations are conducted by the Critical Incident Investigation Team . As part of these investigations, it is the Department's practice to separate suspects and witnesses from each other and any third parties not actively involved in conducting the investigations.

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[4] 37 PERB ¶4507 (2004).

In both the critical incidents in-issue here, the police officers requested, and were denied by the Department, representation by the Locust Club prior to and during the investigatory interviews conducted by the Critical Incident Investigation Team. In Officer McHale's case, the Locust Club's attorney presented an Order to Show Cause enjoining the Department from excluding union representatives or attorneys from interviews of unit members pending a hearing on the show cause application. Officer McHale asserted his right to remain silent when asked for a statement during the criminal investigation. Officer Snow was denied union representation during his criminal investigation interview. He asserted his constitutional right to counsel and, after consultation with the Locust Club's attorney, he invoked his constitutional right to remain silent. Both officers were afforded representation by the Locust Club during their interviews by the Professional Standards Section.

DISCUSSION

It was only in 2002 when the issue of the right of union representation during an investigatory interview was first presented squarely to the Board. In our decision in *NYCTA*, we determined that the rights set forth in *Weingarten* were applicable to public employees covered by the Act. As we stated in *NYCTA*: " We here find that an employee has the right to union representation during an investigatory interview which may reasonably lead to discipline."[5] The question presented in the instant case is whether the right to union representation extends to a criminal investigation interview of

[5] *Supra*, note 1 at 3082.

a police officer related to actions taken by the police officer in the performance of his or her duties as a police officer.[6] We find that it does.

The City relies on numerous decisions of the Board which found that demands relating to the conduct of criminal investigations by an employer are nonmandatory subjects of negotiations in support of its assertion that the right to union representation does not extend to criminal investigations.[7] We reject the City's argument on this point. First, as correctly noted by the ALJ, in none of those decisions was union representation a deciding factor in the determination on the negotiability of the demand. Second, as we noted in *City of Buffalo*:[8]

> Employees have the protected statutory right to have union representation with respect to any issue affecting their employment relationship, whether or not that issue embraces a mandatory subject of negotiation. That request for and receipt of union representation constitutes participation in a union, a right specifically protected by §202 of the Act.

That the procedures for the conduct of criminal investigations may involve nonmandatory subjects of negotiations does not compel a conclusion that a police

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[6] We do not reach the issue of a police officer's rights to union representation during a criminal investigation that is not related to actions taken by the police officer as part of his or her employment.

[7] *City of White Plains*, 33 PERB ¶3051 (2000); *Schenectady PBA*, 21 PERB ¶3022 (1988); PBA of Newburgh, *New York, Inc.*, 18 PERB ¶3065 (1985) *petition dismissed*, 19 PERB ¶7005 (sup. Ct. Albany County 1986); *Police Ass'n of the City of Mt.Vernon, Inc.*, 13 PERB ¶3071 (1980); *PBA of the City of White Plains, Inc.*, 12 PERB ¶3046 (1979); *City of Rochester*, 12 PERB ¶3010 (1979); *Town of Haverstraw*, 11 PERB ¶3109 (1978) (later history omitted); *PBA of Hempstead, N.Y., Inc.*, 11 PERB ¶3072 (1978); *Police Ass'n of New Rochelle, Inc.*, 10 PERB ¶3042 (1977); *Troy Uniformed Firefighters Ass'n, Local 2304, IAFF*, 10 PERB ¶3015 (1977); *Scarsdale PBA, Inc.*, 8 PERB ¶3075 (1975).

[8] 30 PERB ¶3021, at 3048 (1997).

officer has no right to union representation during the conduct of an investigatory interview that is part of a criminal investigation into actions taken by the police officer as a police officer.

While we have recognized that it is an inherent governmental function of a police department to investigate possible criminal activity within its jurisdiction,[9] the department's right to conduct such investigations is limited in several areas by a variety of constitutional and statutory restrictions; for example, the rights of suspects articulated by the Supreme Court in *Miranda v. Arizona*.[10] The right to union representation at a criminal investigation interview into the performance by a police officer of his or her duties is no more intrusive than the right to counsel afforded to every citizen pursuant to *Miranda*.

The City's public policy argument that criminal investigations not be impeded by the involvement of a union representative is not without merit. However, the argument ignores the strictures placed by the Supreme Court in *Weingarten* upon the actions of a union representative before and during the investigatory interview. In *Weingarten*, the Court held that:

> ... exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one.[11]

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[9] *See Police Ass'n of New Rochelle*, 10 PERB ¶3042 (1977).

[10] 384 US 436 (1966).

[11] *Supra*, note 2 at 259.

The representative is there to assist the employee but not to negotiate with the employer or interfere in any way with the progress of the investigation. The employer is free to insist on hearing the employee's own account of the matter under investigation.[12] The integrity of the investigation is not compromised by the presence of a union representative any more than it is compromised by the presence of the police officer's attorney, which the City concedes is required by *Miranda*.

The holding in *Weingarten* is not limited to only a disciplinary interview. The language of the Court makes its holding applicable to "an investigatory interview which the employee reasonably believed might result in disciplinary action."[13] We find that a police officer who is subject to a criminal investigation interview into the performance of his or her duties which may constitute criminal behavior has a reasonable belief that discipline will follow. The City notes in its pleadings that police officers are only performing their police officer functions when they answer questions during a Critical Incident Investigation interview.[14] The failure to so perform police officer functions could lead a police officer to reasonably conclude that discipline would follow.

As Officers McHale and Snow both requested union representation before their Critical Incident Investigation interviews and such requests were denied by the City and the City denied representatives of the Locust Club access to the police officers after the officers requested representation, we find that the City violated §209-a.1(a) of the Act.

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[12] *See, Commonwealth of Pennsylvania (Dep't of Corrections, Retreat SCI)*, 34 PPER 140 (2003), holding that the permissible extent of participation of a *Weingarten* representative is somewhere between mandatory silence and adversarial confrontation.

[13] *Supra*, note 2 at 252.

[14] Answer (U-23938), p. 6.

The City's exceptions are denied and the ALJ's decision is, therefore, affirmed.

IT IS, THEREFORE, ORDERED that the City:

1. Cease and desist from refusing to permit a Locust Club representative to be present when a member requests representation at criminal investigations conducted by the Critical Incident Team relating to possible criminal conduct of a member arising from the performance of his or her job.
2. Cease and desist from refusing to permit a Locust Club representative to confer with members when a member requests representation prior to a criminal investigation conducted by the Critical Incident Team relating to possible criminal conduct of a member arising from the performance of his or her job.
3. Sign and post the attached notice at all locations normally used to communicate with members of the Locust Club.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Rochester, in the unit represented by the Rochester Police Locust Club, Inc., that the City of Rochester will:

1. Not refuse to permit a Locust Club representative to be present when a member requests representation at criminal investigations conducted by the Critical Incident Team relating to possible criminal conduct of a member arising from the performance of his or her job.

2. Not refuse to permit a Locust Club representative to confer with members when a member requests representation prior to a criminal investigation conducted by the Critical Incident Team relating to possible criminal conduct of a member arising from the performance of his or her job.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

CITY OF ROCHESTER

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION DIVISION 726, AFL-CIO,

Charging Party,

- and -

CASE NO. U-23339

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

GLADSTEIN, REIF & MEGINNISS, LLP (BETH M. MARGOLIS of counsel), for Charging Party

MARTIN SCHNABEL, GENERAL COUNSEL (ROBERT K. DRINAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York City Transit Authority (Authority) to a decision of an Administrative Law Judge (ALJ) finding that the Authority violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it disciplined an employee represented by the Amalgamated Transit Union Division 726, AFL-CIO (ATU) for a uniform violation and when it denied his request for union release time. The ATU has filed cross-exceptions to the ALJ's dismissal of certain of the other alleged violations set forth in the ATU's improper practice charge.

EXCEPTIONS

The Authority excepts to the ALJ's finding of a violation of §§209-a.1(a) and (c) of the Act, arguing that the ALJ erred by finding that the filing of hundreds of meritless grievances is a protected activity and by finding anti-union animus in its treatment of Miguel Mendez, an ATU grievance representative.

The ATU cross-excepts to the ALJ's decision dismissing as untimely the allegation in its charge that the Authority violated §209-a.1(d) by unilaterally changing its past practice of granting ATU officials leave to attend monthly ATU meetings. The ATU also cross-excepts to the ALJ's dismissal of the allegations in the charge that Frank O'Connor was disciplined for exercising his rights under the Act.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are set forth in painstaking detail in the ALJ's voluminous 65-page decision[1] and will be summarized here only as necessary to address the exceptions and cross-exceptions.

The Authority operates two bus depots on Staten Island: Castleton and Yukon. One of the duties of a Maintainer Helper Group B (MHB) is to change bus tires. Frank O'Connor has been an MHB for 18 years and, in 2001, was appointed by Larry Hanley, then president of ATU, as a "title representative" of MHBs at Castleton. Miguel Mendez has been employed by the Authority as a bus operator since 1991. At the times relevant to the charge, he was assigned to the Yukon depot. Mendez was also the recording

[1] 37 PERB ¶4506 (2004).

secretary for ATU and was handling disciplinary and grievance hearings and conducting safety walks.

Miguel Mendez

Mendez filed 36 grievances with General Superintendent Palmer Reale on behalf of the ATU on April 3, 2002, at approximately 10:30 a.m. The grievances alleged violations of the parties' collective bargaining agreement, mostly Article 1, and dealt primarily with buses on which there was a broken speedometer. At 3:00 p.m. on the same day, Mendez was served with a notice of discipline (NOD), alleging that he had driven an Authority bus on April 2, 2002, while not in uniform, and seeking a five-day suspension.[2] Mendez had driven the bus with other drivers as passengers to the depot to pick up their buses. He had been involved in a disciplinary hearing right before his shift started and testified that he was running late and went down to his bus without returning to his office to retrieve his tie. The Authority's General Superintendent, Robert Balsamo, and Assistant General Manager (AGM) Richard DeVito saw him without his tie and DeVito remarked to him at the time that he was "easy to get".

When Mendez informed Hanley that he had been served with the NOD, Hanley told him that Balsamo had said that "for every grievance Mendez filed they [the Authority] were going to write somebody up" and that Mendez would be written up

[2] At the time of the hearing in this matter, Mendez was proceeding to arbitration on the NOD. Mendez testified that the typical penalty for a uniform infraction is reinstruction by a supervisor.

for not wearing his tie on April 2.[3] Balsamo never disputed making that statement.[4] Mendez stated that a supervisor, Rourke, told him that he had been instructed to stand outside a depot and write violations for any drivers not in proper uniform. Mendez also testified that an AGM named Bryant asked him, in reference to the Authority's actions in writing up drivers for uniform infractions, if he wanted "to call a truce." That these statements were made is not disputed by the Authority.[5]

On April 29, 2002, Mendez submitted a request for union release time to attend an ATU membership meeting on May 3, 2002. His request was denied on May 2. The meeting was a regularly scheduled meeting and Mendez testified that the Authority had never before denied such a request from him. The notation on the bottom of the denial of leave request document stated that the release time was denied because the relief bus driver list was exhausted. Despite the denial of leave, Mendez attended the meeting on May 3, 2002. He was charged with being AWOL and served with an NOD on May 17, 2002.

Union release time

The ATU filed an amended charge, on September 12, 2002, alleging that the Authority's failure to grant Mendez (and others) release time on May 2, 2002, to allow him to attend the May 3, 2002 membership meeting was a unilateral change in the parties' past practice of granting ATU officials release time to attend monthly union

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[3] Transcript (November 7, 2002), p.93.

[4] The Authority argues in its brief in support of its exceptions that "perhaps due to the length of the hearing, Balsamo was not, apparently, asked to respond to Hanley's characterization of the statement." Brief, p. 9, note 3.

[5] Neither Rourke nor Bryant testified at the hearing.

meetings, in violation of §209-a.1(d) of the Act. Prior to that amendment, the ATU had alleged in its original charge only that the refusal to grant Mendez and other ATU officials release time in May 2002 had violated §§209-a.1(a) and (c) of the Act. The ALJ found that the amended charge, alleging a violation of §209-a.1(d), having been filed more than four months after the alleged improper conduct,[6] was untimely and dismissed that aspect of the charge.[7]

Frank O'Connor

The Authority served O'Connor with four disciplinary notices on June 21, 2002, the Friday immediately preceding Monday, June 24, 2002, the date of the first conference scheduled in this matter. The NODs were for changing only seven tires per day, instead of the requisite eight, on June 5, 10, 12, and 20, 2002. O'Connor had been under close supervision at Balsamo's instruction in March and April 2002 after Balsamo received reports in January 2002 about cracked rims on tires being changed at the Castleton depot. O'Connor was one of two MHBs who was under scrutiny. O'Connor, during and, perhaps, as a result of the scrutiny, engaged in a work slowdown, during which he and his partner reduced the number of tires changed from eight per day to five, six or seven per day. During that time, relations between the ATU and the Authority were strained and relations between O'Connor and his supervisors were contentious. Assistant General Superintendent Carmine Mastrangelo counseled O'Connor in March

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[6] PERB's Rules of Procedure (Rules), §204.1(a).

[7] The ALJ also determined that the ATU attempted to argue in its brief that the Authority had imposed a 48 to 72 hour advance notice requirement for union release time requests as a unilateral change in a term and condition of employment. The ALJ rejected the claim as not being part of the charge before her and as having no support in the record, as the stated reason for the denial of Mendez's request for leave to attend the May 3, 2002 membership meeting was staffing needs, not lack of advance notice.

and April 2002 about his productivity. Upon the request of the ATU, the March and April counseling memorandums were withdrawn. O'Connor failed to improve his performance and the NODs were issued in June 2002, citing him for four days in which his productivity dropped to seven tire changes per day. When O'Connor questioned AGM DeVito in July 2002 as to why he had been served with the NODs right before the conference on the improper practice charge, he was told that it was "all about leverage".[8]

DISCUSSION

The ALJ made several credibility resolutions in determining the facts upon which the decision is based. Her credibility resolutions are based upon the demeanor of the witnesses at the hearing and the manner in which they offered their testimony. There is nothing in the record that would warrant disturbing those credibility resolutions[9] and we hereby adopt them and the ALJ's findings of fact.

We affirm the ALJ's determination that the alleged violation of §209-a.1(d) of the Act was untimely filed. The denial of the leave request occurred on May 2, 2002; the amended charge alleging that the Authority's action was a change in the parties' past practice was not filed until September 12, 2002.

We have allowed amendments to include a newly alleged violation of a different subsection of the Act to an improper practice charge where a newly alleged violation is

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[8] DeVito was not called to testify at the hearing.

[9] *See City of Rochester*, 23 PERB ¶3049 (1990), *conf'd*, 182 AD2d 1081, 25 PERB ¶7004 (4th Dep't 1992). *See also Fashion Institute of Technology v. Helsby*, 44 AD2d 550, 7 PERB ¶7005 (1st Dep't 1974).

part of the facts and transactions set forth in the original charge.[10] Where, however, the amendment seeks to add a different cause of action, albeit based upon similar facts, an amendment which is not timely filed is not permitted.[11] Here, the facts set forth in the May 24, 2002, amendment allege that Mendez was denied union release time in retaliation for the exercise of protected rights. An amendment filed on September 12, 2002, alleges that the denial Mendez's request for union release time violates §209-a.1(d) of the Act because it is a unilateral change in a past practice. New facts to support the alleged (d) violation were pled and were in addition to facts pled earlier in support of the alleged (a) and (c) violations. We have previously noted several times that amendments adding new causes of action are properly denied.[12]

Miguel Mendez

The ALJ found that the Authority violated §§209-a.1(a) and (c) of the Act when it disciplined Mendez for not wearing his tie on April 2, 2002, and when it denied his request for union release time on May 3, 2002.[13] The ALJ found that Mendez had been involved in protected activity while representing employees in labor-management issues and in filing and processing grievances, and particularly, when he filed 36 grievances on

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[10] *Village of Depew*, 24 PERB ¶4560 (1991), *affirmed on other grounds*, 25 PERB ¶3009(1992).

[11] *Town of Brookhaven*, 25 PERB ¶3077(1992).

[12] *See, e.g., State of New York (Dep't of Transportation)*, 23 PERB ¶3005 (1990), *conf'd*, 174 AD2d 905, 24 PERB ¶7014 (3d Dep't 1991); *Service Employees Int'l Union, Local 222*, 16 PERB ¶3063 (1983); *Public Employees Fed'n*, 14 PERB ¶3036 (1981); *Brookhaven-Comsewogue Union Free Sch. Dist.*, 9 PERB ¶3012 (1976).

[13] No exceptions were filed regarding the ALJ's determination that the Authority violated the Act when it disciplined four other drivers on April 3 and/or April 4, 2002 for uniform violations. We, therefore, do not reach her decision on those aspects of the charge.

April 3, 2002. She also found that his supervisors and those in management had knowledge of his activities. The ALJ concluded that but for the filing of the grievances on April 3, 2002, Mendez would not have been disciplined later that day for the uniform infraction of the previous day. The Authority argues that the filing of 36 frivolous grievances is not protected activity and that the penalty was warranted based upon Mendez's previous employment record.

It is well-settled that the proof required in §§209-a.1(a) and (c) cases is that the charging party establish that the employee was engaged in a protected activity, the employer knew of the protected activity and that the complained of employer's action would not have been taken but for the exercise of protected rights by the charging party.[14] We find, as did the ALJ, that Mendez was engaged in protected activity when he filed the grievances on April 3, 2002. The number of grievances and their subject matter do not here destroy the protection afforded by the Act to this fundamental organizational activity, especially when there is no record evidence which compels a finding that the number of grievances was onerous or the claims were undeniably frivolous. We have held in the past that the Act protects an employee who engages in conduct on behalf of the employee organization, such as the filing of grievances.[15] It is only when such conduct becomes inappropriate, that an employer may impose justifiable discipline.[16] There is no dispute that the Authority was aware of the grievances filed by Mendez on

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[14] *See State of New York*, 33 PERB ¶3046 (2000), conf'd sub nom. Benson v. Cuevas, 293 AD2d 927, 35 PERB ¶7008 (2002), *lv denied*, 98 NY2d 611, 35 PERb ¶7017 (2002).

[15] *County of Wyoming*, 34 PERB ¶3042 (2001).

[16] *City of Utica*, 33 PERB ¶3039 (2000); *State of New York (Dep't of Social Servs.)*, 26 PERB ¶3035 (1993).

April 3. That the NOD issued to Mendez was improperly motivated is amply demonstrated by the timing of the NOD, coupled with the severity of the penalty sought and Balsamo's statement to Hanley. While urged to do so by the Authority, there is nothing in the record to warrant disturbing the ALJ's finding that Balsamo's unrebutted statement was made or that an improper motive be assigned to it.

We need not, as did the ALJ, find that Balsamo's statement is a *per se* violation of the Act. The statement is sufficient evidence of the animus Balsamo felt toward Mendez for filing the grievances and the improper motivation behind the issuance of the NOD to Mendez. In *Greenburgh #11 Union Free School District*[17] (hereafter, *Greenburgh*) we reevaluated the nature of a *per se* violation of §§209-a.1(a) and (c) and departed from our prior holdings, in particular an earlier Board decision in *State of New York*.[18] In that case, we first articulated a standard of proof that an employer's conduct which was so inherently destructive of a §202 right was "irrebuttably presumed" to have been done for the purpose of depriving employees of such rights. We reasoned in *Greenburgh* that the Act requires deliberate conduct on the employer's part for the purpose of depriving public employees of such rights in order for a violation of §§209-a.1(a) and (c) to be found. As we said in *Greenburgh*, the concept of an irrebuttable presumption is no longer tenable because such an assumption is conclusive and cannot be contradicted, modified or explained. We went on to hold that the better rule would be to hold that the facts make out a permissive presumption, which is favored in New York law, and which would shift the burden of going forward to the responding party to rebut the presumption by sufficient proof to the contrary.

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[17] 33 PERB ¶3018 (2000).

[18] 10 PERB ¶3108 (1977).

Here, the filing of the grievances by Mendez, followed almost immediately by the issuance of a NOD against him, coupled with the unrebutted statement from Balsamo that for every grievance filed an employee would be written up and Mendez would be disciplined for not wearing a tie, and the statements of Rourke and Bryant to Mendez, created a presumption that Mendez would not have been disciplined but for his exercise of a protected right. The Authority has not introduced evidence sufficient to rebut the presumption.

Likewise, the Authority's denial of Mendez's request for union release time for the membership meeting on May 3, 2002, was improper. The timing of the denial, following shortly after the filing by Mendez of 36 grievances and his receipt of the NOD, coupled with Balsamo's expression of animus was sufficient to establish a *prima facie* case by the ATU. The Authority's mere notation on the denial of leave request that relief drivers were not available, without record evidence that relief drivers were unavailable, is insufficient to establish a legitimate business reason for the denial.[19]

However, no remedy may be ordered even though the Authority's denial of union release time for Mendez violates §§209-a.1(a) and (c) of the Act. Mendez was absent from work without permission to attend the May 3 membership meeting. The discipline which followed cannot be rescinded because the Authority acted improperly initially, given Mendez's intervening misconduct. Mendez should have complied with the Authority's decision and sought redress through the appropriate channels.[20]

Frank O'Connor

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[19] *See Village of Scotia v. PERB*, 241 AD2d 29, 31 PERB ¶7008 (3d Dep't 1998).
[20] *See State University of New York (SUNY Oswego)*, 36 PERB ¶3015 (2003), *petition for review pending.*

ATU argues that the ALJ erred by finding that the Authority's issuance of four disciplinary charges to O'Connor did not violate the Act. It is undisputed that O'Connor did not change eight tires on the days for which he was disciplined. ATU argues that there were reasons that prevented O'Connor from changing eight tires per day and that O'Connor had not been changing eight tires a day during March and April. He was not disciplined during that time, hence, the issuance of the four NODs just before the PERB conference on the original improper practice charge must be found to have been for an improper purpose.

The record shows that O'Connor was counseled in March and April for his sub-standard productivity. O'Connor's productivity did not improve and he was served with the NODs in June 2002. The ALJ found that, although O'Connor may have been told that the timing of the filing of the NODs (just before the pre-hearing conference) was based on leverage, the Authority had legitimate business reasons for disciplining O'Connor for productivity deficits. There is sufficient evidence in the record to support the ALJ's conclusion that O'Connor had decreased productivity during the months preceding the service of the disciplinary charges in June 2002. DeVito's statement to O'Connor about the timing of the service of the notices does not, as found by the ALJ, alter the fact that the Authority established that there were genuine business reasons which prompted O'Connor's discipline.

Based on the foregoing, we dismiss the exceptions filed by the Authority and the cross-exceptions filed by ATU and affirm the decision of the ALJ.

We find, therefore, that the Authority violated §§209-a.1(a) and (c) of the Act regarding the April 3, 2002 discipline of Mendez for uniform violations and for the denial of Mendez's request for union release on May 3, 2002.

IT IS THEREFORE ORDERED THAT the NYCTA forthwith:

1. Rescind the notice of discipline issued to Miguel Mendez on April 3, 2002, for uniform violations and make him whole for lost wages or benefits, if any, suffered as a result of said discipline, with interest at the maximum legal rate;

2. Cease and desist from interfering with, restraining and discriminating against Miguel Mendez in the exercise of rights protected by the Act, by disciplining him for filing grievances and/or for grievance activity;

3. Cease and desist from interfering with, restraining and discriminating against Miguel Mendez in the exercise of his rights protected by the Act, by denying him union release time to attend monthly membership meetings based on his having filed grievances;

4. Sign and post the attached notice at all locations customarily used to communicate with employees represented by the Amalgamated Transit Union Division 726, AFL-CIO.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the New York City Transit Authority (NYCTA), in the unit represented by the Amalgamated Transit Union Division 726, AFL-CIO (ATU) that the NYCTA will:

1. Rescind the notice of discipline issued to Miguel Mendez on April 3, 2002, for uniform violations and make him whole for lost wages or benefits, if any, suffered as a result of said discipline, with interest at the maximum legal rate.

2. Not interfere with, restrain and discriminate against Miguel Mendez in the exercise of rights protected by the Act, by disciplining him for filing grievances and/or for grievance activity.

3. Not interfere with, restrain and discriminate against Miguel Mendez in the exercise of his rights protected by the Act, by denying him union release time to attend monthly membership meetings based on his having filed grievances.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

New York City Transit Authority

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 41,

Charging Party,

- and - **CASE NO. U-24260**

TOWN OF EVANS,

Respondent.

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA, LLP (RICHARD D. FURLONG of counsel), for Charging Party

SARGENT & COLLINS, LLP (RICHARD COLLINS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Evans (Town) to a decision of an Administrative Law Judge (ALJ) that found the Town violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it refused a request for information submitted by the International Brotherhood of Electrical Workers, Local 41 (IBEW) in order to prosecute a grievance.

EXCEPTIONS

The Town excepts to the ALJ's decision on various legal grounds addressed to the ALJ's dismissal of the Town's affirmative defenses. The IBEW filed its brief in response to the exceptions and in support of the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

The Board adopts the ALJ's findings of fact but amends same to include, *inter alia*, the facts stipulated by the parties at the hearing held on August 14, 2003 and omitted from the ALJ's decision:[1]

> [Elmar] Kiefer was provided with charges . . . annexed to the [Answer]. The union filed a grievance contesting the discharge under the terms of the parties' collective bargaining agreement and the Town denied the grievance and that the Union then duly, under the terms of the agreement, filed their Demand For Arbitration . . . [T]he Supervisor received the request for information . . . [P]rior to the filing of the charge, the Town's conduct amounted to a refusal to turn over the information.[2]

The charge alleged in substance that the Town terminated Kiefer's employment on or about April 10, 2003. Kiefer was employed as the Town's Accountant and, by letter dated April 10, 2003, he was informed of the six charges that resulted in the Town's decision.

The Town filed an answer that sets forth six affirmative defenses. The first affirmative defense asserts that, under §§75 and 76 of the Civil Service Law, a public employee has no right to discovery. The parties' collective bargaining agreement omits any procedure for discovery in the grievance article. The second affirmative defense asserts that the request for information is not a request for information in furtherance of negotiations between the parties. The third affirmative defense contains the parties' entire agreement as to "how grievances in a discipline matter are to be filed, processed and resolved." The fourth affirmative defense asserts that the request is a "blunderbuss demand". The fifth affirmative defense asserts that the demand seeks information that

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[1] 37 PERB ¶4514 (2004).

[2] Transcript, pp. 13-15.

does not exist or is not yet fully developed. The last affirmative defense alleges that the information sought is "privileged."

IBEW's request is fully set forth in the ALJ's decision. IBEW's request for information mirrored the Town's six charges which formed the basis for Kiefer's termination from employment.

At the hearing held on August 14, 2003, the parties put the charge and the answer, with exhibits, into the record. The parties called no witnesses and agreed to submit the charge to the ALJ upon the pleadings and stipulation. The ALJ found a violation of §§209-a.1. (a) and (d) of the Act.

DISCUSSION

We recently decided a case with issues similar to that raised in the instant case. In *County of Erie and Erie County Sheriff*,[3] the employment of a deputy sheriff was terminated. The disciplinary charge there involved sexual harassment. The union requested information in order to process the deputy's grievance. The County argued that the information sought was confidential. We held that, upon demand, a public employer must provide information that is relevant and necessary for the administration of a collective bargaining agreement, including the investigation of grievances. This obligation is not without limits. It is limited by the necessity and relevancy of the information sought, the reasonableness of the request, considering the burden on the employer, and the availability of the information elsewhere. The ALJ here found that the Town's refusal to provide the requested information constituted a violation of §§209-a.1(a) and (d) of the Act. We agree.

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[3] 36 PERB ¶3021 (2003) (petition for review pending). *See also International Union of Operating Engrs., Local 409*, 36 PERB ¶3034 (2003) (petition for review pending).

The Town's threshold exception argues that the parties bargained for the rights and immunities embodied in §§75 and 76 of the Civil Service Law. This argument lacks merit. The charge draws its essence from the Act and not the parties' agreement. The Town's second exception contends that IBEW's demand "was not tailored to seek truly relevant and material information". The disclosure of material relevant to a grievance prior to arbitration enables a union to make an informed decision of the merits of its claim and, thus, determine the appropriate action to take. In so doing, it also compels a public employer to weigh the strength of its case. The public interest is served by the timely resolution of grievances and discriminating use of public time and expense.

The Town's third exception argues that the ALJ's dismissal of the fifth affirmative defense was error because IBEW information demand sought records and documents that do not exist and the Town was under no obligation to produce. The ALJ correctly observed that the IBEW's demand follows the reasons outlined in the Town's letter to Kiefer dated April 10, 2003. If the Town relied upon this information to support the reasons listed in its letter of April 10, 2003, the Town is under an obligation to provide it to IBEW in response to the demand and, therefore, the Town's reliance upon *New York State Inspection, Security and Law Enforcement Employees, District Council 82 v. Kinsella*, 197 AD2d 341, 27 PERB ¶7006 (3rd Dep't 1994), is misplaced. The Court, in *Kinsella*, affirmed the Board's decision to dismiss Council 82's improper practice charge because it failed to prove that the State violated its bargaining obligation under the Act, when it refused requests to provide information that did not yet exist.

The Town's fourth exception seeks to protect allegedly privileged information. The Town's response that it has no obligation to respond to the demand is incorrect. The Town's obligation is to explain fully and clearly the facts and circumstances upon

which the claimed exemption is based.[4] It is the nature of the information demanded which is relevant to any privilege defense, not the reasons prompting the demand.[5] IBEW sought records and documents used by the Town to form the basis of the charges against Kiefer. The Town has the burden of demonstrating this information is exempt from disclosure as attorney work product, material prepared for litigation or confidential based upon some rule, statute or case law.[6] It is fundamental to the Act that an employer's denial of a reasonable demand for information which is relevant to the adjustment of grievances interferes with a union's ability to represent the interests of the employees within its unit in violation of §209-a.1(a) of the Act.[7]

The Town's last exception complains that the ALJ erred by not conducting an *in camera* examination of the documents that were claimed to be privileged. We disagree. The New York Court of Appeals, in *Cirale*, opined that

> it will be the rare case that *in camera* determinations will be necessary. A description of the material sought, the purpose for which it was gathered and other similar considerations will usually provide a sufficient basis upon which the Court may determine whether the assertion of governmental privilege is warranted.[8]

Here, the Town produced certain documents on the day of the hearing for the ALJ to review *in camera* and decide whether the material was privileged. The better

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[4] See CPLR 3103(a); CPLR 3122. (While the CPLR is not binding on PERB, reference to it is instructive as to procedural issues before us); 44A NY Jur 2d, Disclosure, §322.

[5] *City of Rochester*, 29 PERB ¶3070 (1996).

[6] *See Cirale v. 80 Pine Street Corp.*, 35 NY2d 113 (1974) (all governmental information is not privileged and such information may not be withheld by a mere assertion of privilege. There must be specific support for the claim of privilege.).

[7] *Supra,* note 6.

[8] *Supra*, note 7, at 119.

approach would have been to timely respond to IBEW's information request and specifically articulate its reasons for the claim of privilege. In so doing, it would have provided IBEW and the ALJ with a sufficient basis upon which to determine whether the Town's assertion of privilege was warranted. Since the Town admittedly refused to provide the information requested and the Town's answer failed to provide any guidance in response to the information requested other than a conclusory statement that the information is "privileged or confidential or attorney's work product. . ., " the Town failed to meet the minimum standards for disclosure of privileged information.[9] The Town's argument that IBEW was aware of the privileged nature of the information requested is irrelevant and unpersuasive. The Act imposes the duty to bargain in good faith. It was incumbent upon the Town to timely respond to IBEW's request and provide IBEW with its rationale for shielding the requested information from disclosure. If IBEW disagreed, and sought the assistance from the ALJ, it would have provided the ALJ with the opportunity to determine whether the Town's assertion of privilege was warranted. We find that the ALJ's refusal to engage in an *in camera* inspection of the requested records was not an abuse of discretion given the Town's refusal to provide any information or an explanation of its privileged character.

Based upon the foregoing, we deny the Town's exceptions and affirm the ALJ decision that the Town violated §§209-a.1(a) and (d) of the Act and direct disclosure of the at-issue information.

IT IS, THEREFORE, ORDERED that the Town provide the IBEW information sought in its request of April 21, 2003.

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[9] *Supra,* note 5.

IT IS FURTHER ORDERED that the Town post the attached notice at all locations used to communicate with unit employees.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Evans (Town) in the unit represented by the International Brotherhood of Electrical Workers, Local 41 (IBEW) that the Town will provide the IBEW information sought in its request of April 21, 2003, and if the Town makes a claim that it is not in possession of the requested information, it shall explain to the IBEW the basis for the claim of non-possession, make a good faith effort to obtain the information sought, investigate alternate sources and communicate to the IBEW the results of those efforts.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

TOWN OF EVANS

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK,

Employer,

- and -

CASE NO. M2003-310

NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,

Petitioner.

WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE of counsel), for Employer

KEVIN S. CASEY, ESQ., for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the State of New York (State) to a ruling of the Director of Conciliation (Director) in conjunction with impasse proceedings initiated by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) under §209.3 of the Public Employees' Fair Employment Act (Act) and Part 205 of our Rules of Procedure (Rules). Council 82 has filed a response to the State's exceptions to the Director's determination that an impasse exists between the parties and the Director's appointment of a mediator.

The State contends that the Director erred in appointing a mediator because the State is ready, willing and able to continue negotiations. The State argues that Council 82 refuses to negotiate. In support of this argument, the State argues that the Director failed to consider the difficulty of the issues, that the State filed an improper practice

charge against Council 82 alleging its failure to negotiate in good faith, and that the Director failed to meet with the respective parties or invite the State to submit a response to Council 82's declaration of impasse.

Council 82 argues in response to the State's exceptions that §205.13 of the Rules mandates that the Board appoint a mediator to assist the parties to effect a voluntary resolution of their collective negotiations. Also, the Director's letter of March 15, 2004, appointing a mediator, notes that the "matter has been under investigation for purposes of determining . . . whether . . . the parties might mutually desire to return to the table for further voluntary negotiations," but, instead, the State filed an improper practice charge against Council 82.[1] Lastly, Council 82 contends that it is within the mediator's discretion to suspend mediation assistance, if, in the opinion of the mediator, the parties' would be better served by meeting on their own.

The State's exceptions seek a review of the Director's determinations involving the dispute resolution provisions of the Act and Rules.[2] In the instant matter, the Director determined that the parties negotiations were at impasse,[3] which warranted the appointment of a mediator. The courts of New York have upheld our jurisdiction to

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[1] The charge was assigned Case No. U-24734. A conference was held on April 5, 2004 and thereafter the parties were advised that further processing of the charge would await the outcome of the Board's decision here.

[2] *See City of New York*, 34 PERB ¶3033 (2001); *Board of Educ. of the City Sch. Dist. of the City of New York*, 34 PERB ¶3016 (2001).

[3] Pursuant to §209.1 of the Act, an impasse may be deemed to exist if the parties fail to achieve agreement at least 120 days prior to the end of the fiscal year of the public employer.

assist parties in the resolution of disputes during collective negotiations.[4] The Court in *Schenectady v. Helsby*[5] declared that:

> in order to effectuate the purpose and intent of the Taylor Law, subdivision 1 of Section 209 must be given a construction that does not render PERB powerless by preventing it from intervening when there is an "in fact" impasse, if not an impasse as defined in said subdivision 1 of section 209.

Here, on December 11, 2003, Council 82 filed a declaration of impasse with PERB after approximately 21 bargaining sessions and the passage of more than eight months since the expiration of the parties' most recent collective bargaining agreement. On March 15, 2004, when the Director informed the parties that he was appointing a mediator to this impasse, almost one year had elapsed since the expiration of the parties' agreement.

Having reviewed the facts and arguments submitted by the State, we confirm the designation of a mediator by the Director in this matter. SO ORDERED.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[4] *See City of Newburgh v. PERB*, 97 AD2d 258 (3rd Dep't 1983), *aff'd*, 63 NY2d 793 (1984); *City of Schenectady v. Helsby*, 57 Misc2d 91 Sup. Ct. Schenectady County (1968).

[5] *City of Schenectady, supra,* note 4, at 93.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-5359**

SACHEM CENTRAL SCHOOL DISTRICT,

Employer,

-and-

SACHEM SCHOOL DISTRICT EMPLOYEES UNION,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding[1/] having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Sachem School District Employees Union has been designated and selected by a majority of the employees of the above named

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[1/]The petitioner sought to decertify the intervenor and be certified as the negotiating representative.

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances:

Included: All full and part time Custodial Workers, Head Custodian, Chief Custodian, Groundsmen, Athletic Groundskeeper, Head Groundsmen, Maintenance Mechanic, Automobile Mechanic, Driver/Messenger, Console Operator, Bus Driver, Bus Monitor, Cook, Supervisory Cook,

Excluded: All Clericals, Administrators, Teachers, Paraprofessionals, Directors, Nurses, Security Personnel, and all other employees of the district not employed in the categories expressly set forth in the included above.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Sachem School District Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PLAINVIEW-OLD BETHPAGE CONGRESS OF TEACHERS,

Petitioner,

-and-

CASE NO. C-5357

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 237,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding[1/] having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

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[1/]The petitioner sought to decertify the intervenor and be certified as the negotiating representative.

IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 237 has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances:

Included: Cafeteria Aides, Teacher Aides, Library Aides, Recreation Aides, Computer Aides, Special Education Aides, Bus Monitors.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 237. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5353

HEMPSTEAD UNION FREE SCHOOL DISTRICT,

Employer,

-and-

HEMPSTEAD SCHOOL CIVIL SERVICE ASSOCIATION, NEA-NY, NEA,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding[1/] having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Hempstead School Civil Service Association, NEA-NY, NEA has been designated and selected by a majority of the employees of the

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[1/]The petitioner sought to decertify the intervenor and be certified as the negotiating representative.

above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances:

Included: All non-teaching employees.

Excluded: Director of Security, Director of Food Services, Superintendent's Secretary , Secretary to the Assistant Superintendent for Curriculum and Instruction, Secretary to the Assistant Superintendent for Business (or the Business Manager), Secretary to the Associate Superintendent for Human Resources, Custodial-Maintenance employees, Teaching Assistant employees, three confidential (non-bargaining unit) personnel in the Human Resources/Personnel Department, and Substitute Employees in Food Service employed four months or less.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Hempstead School Civil Service Association, NEA-NY, NEA. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF TEACHERS,

Petitioner,

-and-

CASE NO. C-5370

FAMILY LIFE ACADEMY CHARTER SCHOOL,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Federation of Teachers has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time teachers, including the Special Education Teacher Support Services (SETSS) Teacher, the Special Education Coordinator, teaching assistants and teaching fellows.

Excluded: Principal, Educational Director, Operations Manager and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Teachers. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member